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In The

Supreme Court of the United States

October Term, 1987

RALPH PALIKAPU O KAMOHOALI'I DEDMAN and
DR. NOA EMMETT AUWAE ALULI,

Petitioners,

vs.

HAWAII BOARD OF LAND AND NATURAL RESOURCES,
ESTATE OF JAMES CAMPBELL and
TRUE/MID-PACIFIC GEOTHERMAL VENTURES,

Respondents.

BRIEF OF RESPONDENTS, ESTATE OF JAMES CAMPBELL AND TRUE/MID-PACIFIC GEOTHERMAL VENTURE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER THE DECISION OF THE HAWAII SUPREME COURT CONFLICTS WITH ANY DECISION OF THIS COURT TO WARRANT FURTHER REVIEW?

II. WHETHER ISSUES PENDING BEFORE THIS COURT IN *LYNG v. NORTHWEST INDIAN CEMETERY PROTECTIVE ASSOCIATION* ARISE FROM SUBSTANTIALLY IDENTICAL FACTS TO THE INSTANT CASE TO WARRANT REVIEW?

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COUNTER STATEMENT OF THE CASE

I. Nature of The Case

This case arises from the Respondent Estate of James Campbell and the True/Mid-Pacific Geothermal Venture's (hereinafter collectively referred to as "Campbell") filing of a Conservation District Use Application (hereinafter referred to as "CDUA") to explore and develop geothermal resources located on lands owned by Campbell in the Kilauea area, Island of Hawaii, State of Hawaii. The Hawaii Supreme Court's decision, which is the subject of Petitioners' writ, is the culmination of numerous public hearings and four evidentiary contested case hearings

which span a period in excess of four years, in addition to a detailed and lengthy briefing process before the Hawaii Supreme Court.

A thorough review of the record created during the extensive evidentiary hearing process reveals a glaring absence of facts which establish that Petitioners or their witnesses conducted or participated in religious ceremonies on the property in question or identified the existence of any religious sites located on the land area in question. *See* Pet. App. pp. 21, 59. The absence of this evidence was noted by the Board of Land and Natural Resources, State of Hawaii (hereinafter referred to as "BLNR") and the Hawaii Supreme Court. Despite this fact, Petitioners have made numerous contentions in their petition for writ of certiorari that there are sacred sites or areas where religious practices occur within the region designated for geothermal exploration and development. As noted by the Hawaii Supreme Court, "the BLNR's action does not compel them, by threat of sanctions, to refrain from religiously motivated conduct or engage in conduct they find objectionable on religious grounds." Pet. App. p. 20. As such, "there is simply no showing of the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent." Pet. App. p. 21.

II. Statement of Facts

On March 2, 1982, Campbell filed an application for a CDUA with the BLNR to develop geothermal resources at Kahauale'a, Puna, Hawaii. Campbell also filed a draft Environmental Impact Statement for the project at Kahauale'a. With the BLNR acting in a quasi-judicial ca-

pacity, hearings were held over 14 days, usually running from 9:00 a.m. through 10:00 p.m. daily. On February 25, 1983, the BLNR issued detailed Findings of Facts, Conclusions of Law and a Decision and Order granting Campbell limted exploration rights within an 800 acre area located at Kahauale'a. Pet. App. pp. 8-9. None of the Petitioners were parties to this first contested case and no party objected to the proposed project on religious grounds.

Following the BLNR's Decision in the first contested case hearing on February 25, 1983, the Hawaii State Legislature during the 1983 Legislative Session passed Act 296 (Section 205-5.1 and 5.2, HRS) which implemented a two-tier planning process designed to ensure the prudent development of geothermal energy as an alternate energy source for the State of Hawaii. Under Act 296, the BLNR was delegated the authority to designate certain land areas in the State as geothermal resource subzones if the criteria set forth in the Act were met. Under Act 296, geothermal development, as defined therein, would only occur in areas designated as geothermal resource subzones. No actual development, however, could occur until the second tier of the geothermal planning process is completed. The second tier involves the filing of a permit with either the BLNR (conservation land) or the County (urban, agricultural or rural land) requesting the right to develop a specific geothermal project within a geothermal resource subzone.

As a result of Act 296, a second contested case hearing was held to determine whether the Kahauale'a area was appropriate for designation as a geothermal resource subzone. Again the BLNR sat in its quasi-judicial ca-

pacity and heard testimony over a period of nine days with hearings running from 9:00 a.m. to 10:00 p.m. daily. The BLNR issued its Decision and Order on December 28, 1984 designating 800 acres in Kahauale'a as a geothermal resource subzone. The Decision and Order, among other things, also requested that Campbell investigate and consider a land exchange involving State owned lands in the Kilauea Middle East Rift Zone (hereinafter referred to as "KMERZ") and the Kahauale'a lands which is situated adjacent to Hawaii Volcanoes National Park. This land exchange was originally suggested by opponents of the geothermal project since a land exchange would relocate the project a greater distance away from the National Park and the active volcanic rift area.

After the decision of December 28, 1984, public hearings and a third contested case hearing were held on the designation of KMERZ as a geothermal resource subzone. The hearings were held over three days with the BLNR issuing its decision on December 20, 1985, designating approximately 9,014 acres of State exchanged lands in the KMERZ as a geothermal resource subzone. On April 9, 1986 the BLNR issued Findings of Fact and Conclusions of Law in support of its Decision and Order. On December 27, 1985, the State and Campbell exchanged deeds, the State receiving the Kahauale'a lands and the Estate of James Campbell receiving a portion of the KMERZ area.

The BLNR accepted Campbell's application for a CDUA on January 3, 1986. A public hearing on the application was heard on January 13, 1986 at which time a fourth contested case hearing was requested. The fourth

contested case hearing was held over a period of nine days with the BLNR issuing its Decision and Order on April 11, 1986, which was later amended by the issuing of detailed Findings of Fact and Conclusions of Law which were filed on June 18, 1986. The June 18, 1986 Decision permits Campbell to explore, develop and produce up to 25 megawatts of geothermal energy and allows Campbell to explore for the future development of an additional 75 megawatts, all subject to conditions on archaeological sites, air, water, land, noise, and light pollution monitoring.

Petitioners, as Appellants below, subsequently filed Notices of Appeals for both the third and fourth contested case hearings. Lengthy Briefs on the appeals were filed by the parties. On July 14, 1987, the Supreme Court of the State of Hawaii rendered its opinion affirming the decision of the BLNR.

Throughout this lengthy zoning and permitting process, a great deal of information was provided to the BLNR which in turn was incorporated in its decision. Petitioners, in their application for writ of certiorari, submit certain facts as being uncontroverted. A closer examination of the record before the Hawaii Supreme Court and before the BLNR shows that the facts put forth by the Petitioners as uncontroverted are deceiving as they reflect only portions of the record and give this Court the impression that specific religious acts were conducted within the KMERZ area and that there are religious sites located on the property. To clarify the record regarding religious practices and the evidence presented, the following facts should be known to this Court:

1. That the Pele religion is only one portion of native Hawaiian religion. According to traditional Hawaiian

religion, there are four major gods: Ku, Kane, Lono and Kanaloa. The responsibility of volcanism rests with the God, Ku. Pet. App. pp. 52-53.

2. That although Petitioners consider any activity impermissible within the area considered to be Pele's abode, the BLNR noted that there were existing man-made structures including pre-existing geothermal wells throughout the region in question. Further, the belief that geothermal exploration and development will cause desecration of Pele is not a view universally held by all Hawaiians. In fact, some Hawaiians believe that the development of geothermal energy is not counter productive to native Hawaiian culture and heritage. Pet. App. p. 57.

3. That nowhere in the record is it reflected that any kumu hula (one who trains others in the tradition of hula) received "power" at sites within in the KMERZ. In fact, as stated by both the BLNR and the Hawaii Supreme Court, "neither of the parties making religious claims nor any of the witnesses testified that they've ever conducted or participated in religious ceremonies on this land." Pet. App. p. 21.

4. In their Petition on page 15, Petitioners state that there is a message from Pele concerning her opposition to geothermal development. This chant is taken out of context as the specific site referred to in this chant is Halema'uma'u which is located approximately 5-10 miles from the KMERZ. It is significant that the BLNR decision notes that by virtue of the land exchange, the proposed development site will be at least five to ten miles away from Moku'a'weoweo and Halema'uma'u where tradition suggests Pele to reside. Pet. App. pp. 56-57. Thus, the site discussed in the chant is not located in the KMERZ area.

In summary, it is important for this Court to recognize that the beliefs of the Petitioners are not universally held by all native Hawaiians, and that the Petitioners did

not submit any evidence regarding any religious activities or religious sites contained within the KMERZ geothermal resource subzone. As such, the granting of rights to Campbell to explore and develop geothermal resources does not, in any manner, burden the religious rights of the Petitioners.

REASONS AND ARGUMENTS FOR DENYING THE WRIT

I. THE DECISION OF THE HAWAII SUPREME COURT IS CORRECT AND CONSISTENT WITH OTHER FREE EXERCISE DECISIONS OF THIS COURT. NO FURTHER REVIEW IS WARRANTED.

Petitioners herein contend that the Hawaii Supreme Court's unanimous affirmance of the BLNR's decision impermissibly burdens the free exercise rights of practitioners of the Pele religion. In determining whether or not an unconstitutional infringment upon the Pele religion exists, the Hawaii Supreme Court applied the following traditional test:

> . . . it [is] necessary to examine whether or not the activity interferred with by the State was motivated by and rooted in a legitimate and sincerely held religious belief, whether or not the parties' free exercise of religion had been burdened by the regulation, the extent or impact of the regulation on the parties' religious practices, and whether or not the State had a compelling interest in the regulation which justified such a burden.

Dedman v. Board of Land and Natural Resources, 740 P. 2d 28, 32 (1987), Pet. App. p. 16. *Accord, Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972); *Sherbert v. Verner*, 374 U.S. 398, 403-09 (1962).

Finding that neither the BLNR nor Campbell contested that the Petitioners' beliefs are rooted in a legitimate and sincerely held religious belief, the court below turned its attention to the second issue of whether or not the Petitioners' free exercise rights had been burdened by the BLNR's decision, and the extent or impact of that decision on the Petitioners' religious practices.

In reviewing the Petitioners' claim, the Hawaii Supreme Court had before it an extensive record comprised of volumes of transcripts and reams of evidence elicited from approximately 156 witnesses during various public and contested case hearings held over a total of 35 days. Despite the opportunity to do so, the Petitioners failed to submit evidence and testimony during the numerous hearings which would demonstrate a recognizable burden of a constitutional magnitude upon their free exercise claims. The court below specifically stated:

> . . . it is uncontested that '[n]either of the [Appellants] nor any of the witnesses testified that they ever conducted or participated in religious ceremonies on this land.' And the Board specifically concluded that '[t]here is no indication that tapping this heat source from the earth has diminished or negatively affected the eruptive nature of Kilauea Volcano.' There is simply no showing of 'the kind of objective

> danger to free exercise of religion that the First Amendment was designed to prevent.[1]

Dedman, 740 P.2d at 33, Pet. App. 21, *citing Wisconsin v. Yoder*, 406 U.S. at 218. Finding no burden on the Petitioners' free exercise rights, the court was not required to shift the legal burden to the State to establish a compelling interest.

In reaching this conclusion, the Hawaii Supreme Court had both the legal and factual basis to affirm the BLNR's decision. The court never departed from the traditional free exercise analysis under *Sherbert, supra* and *Wisconsin, supra* as Petitioners allege. The court never inquired into the degree or severity of the burden on the Petitioners' religion, finding instead that they failed to establish *any* burden at all.[2] *See* Pet. Br. pp. 38-41. There was none of the "coercive effect" or "substantial pressure" upon the practitioners to modify their behavior and violate their beliefs. *See Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707, 718 (1981).

In their petition for writ of certiorari, Petitioners are now advocating an interpretation of free exercise an-

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[1]In addition to the record, the court was informed that since 1982, two other geothermal projects were already engaging in exploration and development production activities within six miles of the KMERZ area. However, Petitioners never contested those projects. Pet. App. pp. 59-61.

[2]During oral argument before the Hawaii Supreme Court, Associate Justices Frank Padgett, Edward Nakamura and Walter Heen indicated that they could not find any evidence in the court record showing that geothermal development would actively interfere with religious activities. *See* Kobayashi, *High Court Leaning Against Pele Worshippers*, The Honolulu Advertiser, April 23, 1987 at p. A-1, col. 1.

alysis unsupported by any precedent from this Court. Relying on *Thomas, supra*, Petitioners propose that the "honest conviction"[3] of the practitioners *alone* is sufficient to meet the burden prong under the free exercise analysis. *Id.* at 716 Pet. Br. p. 37. However, Petitioners' advocacy of such a subjective *per se* rule ignores the context in which this Court considered Thomas' "honest conviction" when analyzing his free exercise claim. Thomas' "honest conviction" described the sincerity of his belief, not the basis for finding a burden. Rather, this Court focused on Thomas' overt conduct, i.e., terminating his employment and his subsequent denial of unemployment compensation benefits, in order to find a burden on his free exercise rights.[4]

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[3]Petitioners' proposed "honest conviction" test arises from *Thomas v. Review Board of the Indiana Employment Security Division,* 405 U.S. 707 (1981) in which this Court stated:

> The narrow function of a reviewing court in this context is to determine whether there was an appropriate finding that the petitioner terminated his work because of an honest conviction that such work was forbidden by his religion. *Id.* at 717.

[4]The free exercise decisions of this Court have all focused upon the objective conduct of the individual when compelled to violate a tenent of his religion or where a benefit or right was made conditional upon his compromising his faith. *See e.g. Hobbie v. Unemployment Appeals Commission of Florida,* 480 U.S. —, 94 L.Ed.2d 190, 107 S.Ct. 1046 (1987) (denial of unemployment benefits violates First Amendment right of follower of Seventh Day Adventist Church when discharged for refusing to work on her Sabbath due to religious convictions adopted after beginning of her employment); *Wooley v. Maynard,* 430 U.S. 705 (1977) (New Hampshire's requirement that all motor vehicles bear the motto "Live Free or Die" violated Jehovah Witnesses' First Amendment rights); *Wisconsin v. Yoder,* 406 U.S. 205 (1972) (Wisconsin's compulsory education law requir-

(Continued on following page)

Petitioners' proposal of a "primary effects" test is equally without merit. Petitioners urge this Court to interpret its free exercise precedent as creating a "primary effects" test whereby "government laws and regulations are constitutionally invalid if their *primary effect* is to impermissibly infringe religion." (Emphasis in original). Pet. Br. p. 24. In assessing the primary effect of the governmental action, petitioners rely on *Thomas, supra,* for the objective standard that "when government activity puts 'substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden on religion exists.'" Pet. Br. pp. 27-28. This argument, however, ignores the Hawaii Supreme Court's finding that:

> . . . the Board's action does not compel [the Pele practitioners], by threat of sanctions, to refrain from religiously motivated conduct or engage in conduct they find objectionable on religious grounds.

Dedman, supra, 740 P.2d at 32-33, Pet. App. 19-20. The court below, based on the record before it, clearly found that the BLNR's decision in no way forces the Petitioners to violate their religious beliefs nor does the decision make receipt of a public benefit or right conditional upon renunciation of religious practice. Therefore, the

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(Continued from previous page)

ing attendance beyond the eight grade violated Old Order Amish's free exercise of their religion); *Sherbert v. Verner,* 374 U.S. 398 (1963) (denial of unemployment compensation to Sabbatarian who refused to work on Saturday where the effect was to pressure a worker to abandon her religious convictions); *cf. Tony and Susan Alamo Foundation v. Secretary of Labor,* 471 U.S. 290 (1985) (no burden on free exercise rights where statute does not require individuals to act in a manner inconsistent with their religious beliefs).

"primary effects" test as articulated by the Petitioners would still result in a clear finding of no burden. The outcome by the court below remains consistent with this Court's free exercise precedent and no further review is warranted.

II. ISSUES PENDING BEFORE THIS COURT IN LYNG v. NORTHWEST INDIAN CEMETERY PROTECTIVE ASSOCIATION, ARE FACTUALLY DISTINGUISHABLE FROM THE INSTANT CASE.

The United States' writ of certiorari to the Ninth Circuit Court of Appeals in *Lyng v. Northwest Indian Cemetery Protection Association, et al.*, No. 86-1013 (October Term 1987) presents legal issues arising from circumstances which are factually distinguishable from the instant case.

The obvious difference is that in *Lyng, supra,* the Indian plaintiffs' *use* of the sacred land for religious purposes was never in dispute. *Northwest Indian Cemetery Protection Association v. Peterson,* 565 F.Supp. 586, 591-92 (N.D. Cal. 1983), *aff'd,* 795 F.2d 688, 692 (9th Cir. 1986). The lower federal court specifically found that "[f]or generations, individual members, spiritual leaders, and medicine persons of the Yurok, Karok, and Tolowa tribes have traveled to the high country to communicate with the 'great creator,' to perform rituals, and to prepare for specific religious and medical ceremonies." 565 F.Supp. at 594.

In contrast, neither the BLNR nor the Hawaii Supreme Court found any evidence that the KMERZ area was ever used in this generation or prior generations for

religious purposes. *Dedman,* 740 P.2d at 33, Pet. App. p. 21. This important factual distinction separates the legal issues before this Court in *Lyng* sufficiently such that no further review is necessary in the instant case.

Moreover, lacking the supporting facts, Petitioners attempt to alter the factual basis upon which the court below rendered its decision in order to create legal issues to parallel those presented in *Lyng.* However, whether or not there has been an infringement of the Petitioners' free exercise right of religion is a factual question. It is a well established rule that this Court does not grant certiorari to review evidence and discuss specific facts. *United States v. Johnson,* 268 U.S. 220, 227 (1925). Moreover, this Court has often held that " a court of law, such as this court is, rather than a court for correction of errors in fact findings, cannot undertake to review concurrent findings of facts by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank and Mfg. Co. v. Linde Air Products Co.,* 337 U.S. 910 (1949). Such error does not exist in this case.

The BLNR, acting in a quasi-judicial capacity, painstakingly reviewed the evidence and testimony in arriving at its Findings of Fact and Conclusions of Law, concluding that there was no burden on the Petitioners' free exercise claims. In turn, the Hawaii Supreme Court, applying a traditional free exercise analysis similarly found no burden and affirmed the BLNR's decision. However, contrary to Petitioners' contentions, the Hawaii Supreme Court never "found evidence that Native Hawaiians sincerely believed that geothermal development would desecrate the body of Pele, destroy Pele by robbing her of

vital heat, interfere with ritual practices, and disable practitoners from training young Hawaiians." Pet. Br. pp. 22-23. Rather, the court was reiterating the Petitioners' assertions and claims of the existence of a burden. *Dedman*, 740 P.2d at 32. Pet. App. p. 18.

Campbell objects to Petitioners' inaccurate statements of the factual basis upon which the Hawaii Supreme Court arrived at its decision and Petitioners attempt, therefore, to create legal issues by misstating essential facts of objective religious conduct to align this case with *Lyng* and bring them within this Courts free exercise decisions.

Finally, to the extent that the geothermal resource in this case is publicly owned, factual similarities with *Lyng* end. The surface area for the geothermal project is privately owned by Campbell. Therefore, Petitioners' request for governmental proscription against any development on private land on religious grounds certainly runs afoul of the Establishment Clause.[5]

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[5]Recognizing that any prohibition against Campbell developing the land in any way in furtherance of Petitioners' belief would necessarily implicate the Establishment Clause, the Hawaii Supreme Court stated:

> The free exercise clause of the state and federal constitution are "written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from the government." [citation omitted]. "[T]he free exercise clause places a duty upon a state to keep from prohibiting religious acts, not to provide the means or the environment for carrying them out." [citations omitted].

Dedman 740 P.2d at 33-34. Pet. App. pp. 24-25.

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CONCLUSION

Petitioners have failed to show that the Hawaii Supreme Court decision in this above-entitled motion is in conflict with opinions of this Court. In addition, Petitioners have not shown that the issues raised by this case are sufficiently important for this Court to exercise its extraordinary jurisdiction. For the foregoing reasons, Respondents request this Court to deny Petitioners' request for certiorari.

Respectfully submitted,

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APPENDIX A

APRIL 23, 1987—THE HONOLULU ADVERTISER,

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HIGH COURT LEANING AGAINST PELE WORSHIPPERS

By Ken Kobayashi
Advertiser Courts Writer

A majority of Hawaii Supreme Court justices indicated yesterday they aren't conviced the state's approval of a Big Island geothermal power project violates the constitutional rights of native Hawaiians to worship the volcano goddess Pele.

The high court has yet to rule on the issue, but during a court hearing, three of the five justices expressed doubts about the constitutional claims.

The three indicated the native Hawaiians must show that the project actually hampers their activities in worshipping Pele.

Otherwise, Associate Justice Edward Nakamura said, halting the project simply because it violates their beliefs would mean the state was unconstitutionally endorsing their religion.

The case is believed to be the first requiring the high court to consider native Hawaiian religious rights based on the worship of the Hawaiian deity.

The challenge to the project was filed by Dr. Noa Emmett Auwae Aluli and Ralph Palikapu O Kamohoali'i Dedman. They were represented by attorney Yuklin Aluli of the Pele Defense Fund and Steven Moore, a Colorado lawyer with the Native American Rights Fund.

The two plaintiffs are contesting decisions by the state Board of Land and Natural Resources last year that allow geothermal exploration and development of the project on 9,000 acres of Campbell State land at Kilauea middle-east rift zone.

The project, attorney Yuklin Aluli argued is "a desecration of the home and the physical manifestation (the steam)" of Pele.

Moore said the court will be "advancing the destruction" of the religion by permitting the project to move forward.

However, three justices indicated they couldn't find any evidence in the court record showing the geothermal development would actually interfere with religious activities.

Associate Justice Frank Padgett called the case "unique" because in other court decisions dealing with violations of religious freedom, the government either forces or forbids the believer to act.

"In this case, (there is) neither one," he said.

Walter Heen, a part-Hawaiian judge from the state appeals court sitting in for Associate Justice James Wakatsuki, questioned how the native Hawaiians could conclude their practice is hampered because they believe the prospect will desecrate Pele.

"How is this a burden on the right to practice this religion?" he asked.

He called that aspect of the constitutional claims "bothersome."

Attorney Aluli argued that the project's "interference" with one's belief is enough to make it unconstitutional.

But Nakamura replied the state would then be violating the First Amendment by helping to establish a religion if it acted on that basis.

Also on the high court are Chief Justice Herman Lum and Associate Justice Yoshiml Hayashi.

Campbell Estate's attorney, Benjamin Matsubara, later said the estate will wait for the high court's ruling before proceeding with the $40 million project, designed to generate at least 25 megawatts of energy.

If the high court upholds the land board's decisions, he said he hopes drilling will start within three months of the ruling.

But Dr. Aluli said Pele will have the "last say, She's already wiped out Kahaulea, (an earlier proposed site about six miles away, destroyed by 1983-1984 volcanic eruptions)."